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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Claudia Wilken, Judge

IN RE COLLEGE ATHLETE NIL LITIGATION) **NO. 4:20-CV-03919 CW**

Oakland, California
Thursday, September 21, 2023

TRANSCRIPT OF REMOTE ZOOM VIDEO CONFERENCE PROCEEDINGS

APPEARANCES VIA ZOOM:

For Plaintiffs:

HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, Washington 98101
BY: STEVE W. BERMAN, ATTORNEY AT LAW

HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, California 94710
BY: BENJAMIN J. SIEGEL, ATTORNEY AT LAW

WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
BY: JEFFREY L. KESSLER, ATTORNEY AT LAW
DAVID L. GREENSPAN, ATTORNEY AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED REMOTELY BY: Ana Dub, RDR, RMR, CRR, CCRR, CRG, CCG
CSR No. 7445, Official U.S. Reporter

APPEARANCES VIA ZOOM: (CONTINUED)

For Plaintiffs:
WINSTON & STRAWN LLP
101 California Street, Suite 3900
San Francisco, California 94111
BY: JEANIFER E. PARSIGIAN, ATTORNEY AT LAW
DREW H. WASHINGTON, ATTORNEY AT LAW

For Defendant National Collegiate Athletic Association:
WILKINSON STEKLOFF
2001 M Street, NW
Washington, D.C. 20036
BY: RAKESH KILARU, ATTORNEY AT LAW

For Defendant Pac-12 Conference:
COOLEY LLP
101 California Street, Fifth Floor
San Francisco, California 94111
BY: WHITTY SOMVICHIAN, ATTORNEY AT LAW

For Defendant The Big Ten Conference, Inc.:
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606-4637
BY: BRITT M. MILLER, ATTORNEY AT LAW

For Defendant The Big Twelve Conference, Inc.:
SIDLEY AUSTIN LLP
2021 McKinney Avenue, Suite 2000
Dallas, Texas 75201
BY: NATALI WYSON, ATTORNEY AT LAW

For Defendant Southeastern Conference:
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246
BY: ROBERT W. FULLER, ATTORNEY AT LAW

For Defendant Atlantic Coast Conference:
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, California 94111
BY: CHRISTOPHER S. YATES, ATTORNEY AT LAW

Thursday - September 21, 2023 **2:46 p.m.**

P R O C E E D I N G S

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THE CLERK: Just a reminder to everyone observing: These proceedings are being recorded by this Court and court reported. Any other recording of this proceeding, either by video, audio, including screenshots or other copying of the hearing, is strictly prohibited.

The United States District Court for the Northern District of California is now in session, the Honorable Claudia Wilken presiding.

Calling Civil Action 20-3919, In Re College Athlete NIL Litigation.

Counsel, please state your appearance for the record, beginning with the plaintiff.

MR. BERMAN: Your Honor, Steve Berman on behalf of the plaintiffs.

MR. KESSLER: Good afternoon, Your Honor. Jeffrey Kessler on behalf of the plaintiffs.

Also here today is my partner, Mr. Greenspan, David Greenspan, and Jeanifer Parsigian, who are also in attendance, and our associate Drew Washington. And also, Ben Siegel is also here today from the Hagens Berman firm.

Thank you, Your Honor.

MR. KILARU: Good afternoon, Your Honor. For the

defendants, Rakesh Kilaru on behalf of the NCAA.

And also on the screen are Robert Fuller for the SEC, Chris Yates for the ACC, Whitty Somvichian for the Pac-12, Natali Wyson for the Big Twelve, and Britt Miller for the Big Ten.

THE COURT: Okay. And did you want to state the appearances of any others who aren't expected to argue but who are present and would like to state their appearance? You can mention their names, if you'd like.

MR. KILARU: No, Your Honor. I think we'll just leave it at that for now. Thanks.

THE COURT: And I am a little concerned about this person at 1703...450 who seems to be here by phone. I don't know who they are or how they got promoted.

I guess they're gone. That takes care of that, whoever they were.

Okay. So we have on the screen all the attorneys who are expected to speak, I take it. And we have the court reporter, Ana Dub, we have the Courtroom Deputy, Jenny Galang, and the law clerk also on the screen. And I guess I've got you all on one screen. Nobody's on the next screen.

We're here today for a number of things, three *Daubert* motions, two from defendant and one from plaintiff; motions for class certification, a couple of, I guess you could call them, housekeeping matters or efforts to bring in new things, and a

case management conference.

So why don't we start with the, sort of, housekeeping matters. We have a request by defendants to add to the record or do something with additional pages from the additional deposition that was taken of the plaintiffs' expert Dr. Rascher.

And I can't remember now whether we have a response. Yeah, I guess we have a response.

I guess what I would consider doing or would throw out there is letting the defendants file a five-page brief on Monday morning, explaining what it is they think the supplemental deposition does to help them with their class cert motion, and have the plaintiffs respond to that with their five pages two days after that.

How does that sound?

MR. KILARU: Your Honor, we're not --

THE COURT: Hearing no objection, I'll assume everyone thinks it's a great idea.

And we'll move on to the matter raised by plaintiffs which is a claim that defendants have suddenly disclosed a lot of people and things that hadn't been disclosed before or in a timely fashion, and plaintiffs think that those people or things should be -- should not be admitted because of the late disclosure.

I haven't seen, I don't think, any response on that.

There was some hope that perhaps some sort of meet and confer could be done to resolve that. I don't want to argue it now because I don't know what the facts are.

But if someone could give me a brief, one- or two-sentence description of the state of the problem, then I can maybe think of something to do about that also.

MR. KILARU: Sure, Your Honor. I'm happy --

THE COURT: Mr. Kilaru, maybe you'd like to tell us what's up with that.

MR. KILARU: Yes, I'm happy to, Your Honor.

The close of discovery isn't for, I believe, a month. As we're continuing to prepare the defense of the case, we have some additional witnesses that we believe have information that bears on the case. We wanted to disclose these witnesses during discovery as opposed to after discovery. There was a little bit of a skirmish about that in the last case, and we think it's proper for us to do so within discovery.

And we're happy to take depositions out of time of these individuals and work with plaintiffs, as we've done on a number of other occasions, including party witnesses, to do so.

THE COURT: Have you made a complete list of all such things and why you need them and why you didn't tell us about them earlier?

MR. KILARU: We're in the process of doing that, Your Honor. I believe two conferences have filed theirs. The

rest will file ours -- NCAA will file ours promptly. It just relates to our continued investigation of the claims and the continued evolution of the claims as we hear about the theories plaintiffs are developing, including through their reply briefs.

THE COURT: Okay. Well, I guess maybe what we could do, then, is have you also on Monday morning, maybe not file but submit to plaintiffs your proposal as to the new people that you want to now disclose and why you want them and why you didn't tell them earlier, and then have a meet and confer and see if you can agree on any of them.

And if you can't, then I guess we'll have to have some sort of brief motion practice, which I'd probably refer to Judge Cousins, and in which I would ask Judge Cousins to consider the reason for late disclosures and compare it with the importance to the interests of justice of allowing the witnesses and making decisions based on that sort of calculation.

So how does that sound?

MR. KILARU: Your Honor, we're happy to do that.

The only thing I would note is that, at least just from our perspective, these aren't late disclosures. Discovery is still open and the plaintiffs are still serving subpoenas and we're serving subpoenas. The discovery period doesn't close for a month. So this isn't a situation where fact

discovery is closed and we're coming in afterwards and trying to expand the record. The record is still being developed.

THE COURT: Right. And I don't know who these people are or what, but there are certain things that are subject to initial disclosures and certain things that are subject probably to answers to interrogatories and that sort of thing. And it may -- I'm just guessing here, based on prior experience, that there might be some argument that these people should have been disclosed earlier in some other format.

So if there isn't, then great, we don't have a problem; but if there is, then we will be balancing the importance of the testimony against the reasons for the disclosure at the time that it was disclosed.

Does this sound all right to the plaintiffs?

MS. PARSIGIAN: Yes, Your Honor. We will accept whatever they submit to us on Monday and meet and confer and then get back to the Court if there is a continuing issue.

THE COURT: Okay. Now, these things aren't going to impact my preparation of the class cert order, which I don't want to delay, but -- so I don't feel the need to set an aggressive schedule for resolving that. I'll just trust you all to resolve it as quickly as you can. And to the extent more discovery is required, keep in mind that I don't want it to interfere with the continued progress of the case or with the trial.

MS. PARSIGIAN: Understood.

(Stenographer interrupts for clarification of the record.)

MS. PARSIGIAN: This is Jeanifer Parsigian. Thank you very much.

THE COURT: I thought she was asking me.

(Laughter.)

THE COURT: Okay. So what else, on the short list?

Well, why don't we just talk about case management. Well, I'll do that last.

We'll talk about the class certification motion. Let me start by confirming with defendants that you are not opposing certification of an injunctive relief class. Am I right?

MR. KILARU: That's correct, Your Honor.

THE COURT: Okay. So we're talking about the three proposed damage classes; and in that regard, we're talking about *Daubert* challenges to three of the experts.

I don't have a lot of questions about the class certification or the experts, but the thing that I'd like to hear about first -- and after that, I'll let you address the things you think you need to -- but I'm not sure I'm grasping the ideology and continued viability of the so-called substitute -- substitution effect.

So what I'd like to do, if I could, is to have the defendants start out from the beginning, like with basics

about: What is a substitution effect? Why does it matter in this case? Where did it come from? And then I'll ask the plaintiffs to tell me what they think of that.

So I don't want to go on forever about it, but if you could just give me a back-to-basics explanation of what the substitution effect is, where it came from, and what it's doing in the case at this point, I would appreciate it.

Mr. Kilaru, would that be you?

MR. KILARU: Yes, that would, Your Honor. And I'm happy to --

THE COURT: Am I pronouncing your name right?

MR. KILARU: You are. Thank you.

THE COURT: Okay.

MR. KILARU: So I think the substitution effect originates from the Rule 23 issues of predominance and manageability, and it goes to the question of whether the plaintiffs have a model, they can actually measure injury on a reliable basis and include in the class only people who are actually injured. So that's the core question under the substitution effect.

THE COURT: Well, but is that -- the class is defined in a certain way, and it's pretty straightforward.

MR. KILARU: Yes, Your Honor.

THE COURT: And --

MR. KILARU: Sorry.

THE COURT: -- at least as to two of them, the broadcast and the video games, they're sort of, by definition, included because they couldn't have been included -- or they couldn't engage in that sort of activity with the preexisting NCAA rules, and they claim that they should be able to and, in so doing, would make money.

So there's not really a question of who they are. It's the people who got on those teams who would be in a position to play games on TV and play games in video games.

It's possibly a slightly different question on the third-party NIL, but we don't really have a problem with figuring out who's in the class.

MR. KILARU: Your Honor, the issue is figuring out who's injured and whether the class consists of people who are injured and injury can be determined on a class-wide basis.

So just as in *O'Bannon*, you have a group of individuals, and the question is: Were those individuals actually injured or not?

And the substitution effect makes it impossible to determine that because, yes, the plaintiffs have a group of people from 2016 through 2020 who they claim are injured, but some of those people owe their spots in the class to decisions by others that would have been different in the but-for world that the plaintiffs are positing.

THE COURT: Well, but you just can't unwrap facts for

years. I mean, yes, somebody might have broken their leg when they were in first grade and not be able to play football, but the fact is, we end up with some teams with certain people on them. And, yes, it might be a question whether they can prove that all those people were actually injured, but it's not hard to prove who's on the teams. And either they were all injured by not being able to get any broadcast revenues or none of them were.

But it's not a question of, oh, there's -- here's 15 people and if only something had been different, it would be a different 15 people. That just isn't that type of case. It's not like some of the other cases like -- well, some of the other cases where this sort of issue has come up.

MR. KILARU: Respectfully, Your Honor, I don't think we agree with that.

THE COURT: The problem with *O'Bannon* was it was a question of who was in the video games.

MR. KILARU: Your Honor, that was one of two problems in *O'Bannon*. One problem was figuring out who was in the video games. The other problem was figuring out who in the putative class was actually injured or not. They're separate parts of the opinion.

There was a first part of the opinion that talked about the substitution effect and the second part of the opinion that talked about the difficulty of figuring out who

was in the video game or who was in the live sports broadcast.

On the first part, the substitution effect, what the Court said, what Your Honor said is we have this group of individuals and the plaintiffs are saying that they are all injured. They're the people who competed in Division I athletics for the last four years.

In this case, it's actually a much smaller group. It's just people, to start with the broadcast class, who competed in a Power 5 school in just the sports of football and basketball for the last four years.

So the question under Rule 23 is: Can they show that all of those people were injured? And, yes, they say that they were all injured, but the fact is that that cannot be determined on a class-wide basis.

Because, let me just give you a specific example. You could have a student athlete at the University of Kentucky play basketball from 2019 to 2020. That person's in the class that the plaintiffs have defined. But in the but-for world the plaintiffs are positing, there are other players who could have taken that person's spot, someone who was at Kentucky the year before and decided to stay for longer because of the increased compensation that they can get, under the model, of hundreds of thousands of dollars; or someone --

THE COURT: Okay. But they didn't. They didn't. Yes, maybe they could have, but they didn't. And the people

who are on the team are the people who are on the team, not people who maybe under some other scenario might have been on the team.

MR. KILARU: Yeah, but, Your Honor, this is an antitrust case, and they have to show that those people are actually injured, not just that they happened to be on the team.

THE COURT: Well, that's a different question. That's a different question. There, we have to decide whether there would have been agreements and what they would have been worth and how they would have been divided and all that. That's a whole different question. That's not a question of who's in the class and who isn't.

But I think I see what you're saying, and let me just ask the plaintiffs if they could respond to it briefly.

MR. BERMAN: Good afternoon, Your Honor. Steve Berman on behalf of the class.

We don't have to -- as you pointed out, we know who's in the class. And all we have to do in a but-for world is to say these people were subject to the restraint; they would have been subject to the restraint four years ago. We have no reason, no evidence to suggest otherwise, that there'd be different people. What you heard from counsel today is pure speculation, that some University of Kentucky basketball player would have perhaps done something different. They have no

evidence of that.

And Your Honor already found in the *Alston* case, where they postulated the same kind of substitution effect, that it was pure speculation. Pure speculation is not enough at the class certification hearing.

Judge Koh in the *High-Tech* case, which was a labor case, a labor market case, said in determining the but-for world -- and we cited this case -- we don't have to figure out how the world would have looked differently. We know who the employees are today. We take those employees, and we see whether they were injured. We don't try to re-create who else might have come into the labor market in the high-tech industry. It'd be like -- if you could use this argument, there would be no certification of any case.

Take a price-fix of chickens. Right? I happen to be doing chickens right now, so it's on my mind. They could say: Well, look, if the price of chicken had been lower, someone else besides the plaintiff would have bought that chicken; and therefore, we don't know whether the plaintiff would have been injured in the but-for world.

That's just not the law. And I point out, very briefly, the law has changed since the *O'Bannon* case. The defendants have no answer to the *Olean* case. And the *Olean* case says you can have a class even if there's up to 28 percent of the people aren't injured.

So here, there's speculation, speculation that a few people might not have been injured; and under *Olean*, that doesn't cut it anymore. That postdates Your Honor's opinion in *O'Bannon*.

And you mentioned something about the lost opportunity class, and maybe there's some legs to the substitution theory. They don't assert the substitution theory to the lost opportunity class.

THE COURT: Oh, right. Good point.

MR. BERMAN: And there's a reason for that, just to enlighten Your Honor for a second. In the lost opportunity class, we have someone who had a NIL opportunity after the rules were lifted. So we know who they are.

THE COURT: Who had a what opportunity? Oh, a NIL opportunity?

MR. BERMAN: NIL opportunity. We know who they are. They signed a deal.

And so we're just saying for those people, they would have signed other deals during the four years going backward, because Rascher explained how the market would have worked. So there is no substitution argument whatsoever.

THE COURT: Can you distinguish this case from *O'Bannon*?

MR. BERMAN: Well, I can distinguish it in a number of ways.

One, change of law, *Olean*. You didn't have the benefit of that opinion.

Two, you were concerned mostly in *O'Bannon*, as I read the order, about the difficulties of trying to figure out who was in those films. There was no way --

THE COURT: Well, that's clearly a separate issue and not relevant here. So I was just more interested in counsel's description of the first half of the *O'Bannon* case.

MR. BERMAN: Sure. In *O'Bannon*, the plaintiffs' experts conceded that there was substitution.

We not only don't concede there was substitution, but we point to the *Alston* case, where there have now been benefits paid. They raised this argument in *Alston*. You rejected it. We have real-world testimony from Dr. Rascher. There has been no substitution, zero. Kids are not moving because all of a sudden they get educational benefits.

And we also know from Dr. Rascher that -- for example, they postulate that maybe some athletes would have gone pro -- right? -- instead of staying in school; and therefore, we don't have a match-up. Maybe these kids in the class would be professional people.

Well, Dr. Rascher has put forth in his report, paragraphs 228, and the reply, 157-164, there are very few slots available to go pro; and it's highly improbable that if you're a student athlete and go pro and there's 45 basketball

slots, that the fact you might get some more NIL money in college would change your decision. It's just not plausible. The opportunity to go pro is too great.

THE COURT: Okay. Did you want to reply, Mr. Kilaru, particularly addressing *Olean*?

MR. KILARU: Yes, Your Honor, a few things.

First, this has no similarity to *Olean* whatsoever. That's a commodity case where the plaintiffs spit out an overcharge for a group of people, and some of the people had a positive overcharge and some didn't. And the Court said: Well, I look at that. I can see who's injured and who's not from the model.

That's very different from what you have here. All the plaintiffs have told you is that they have a model that tells you who is in their putative class. You can get that by just looking at rosters. That doesn't tell you who's injured. It doesn't tell you who's actually injured.

And the logic of *O'Bannon* applies perfectly well here because the logic of *O'Bannon* is, someone might stay in school longer as a result of increased compensation. We have proof of that. Someone might go to one of these schools --

THE COURT: But it's not obvious -- I mean, it is -- whether or not they were injured is, I guess, a question; but either they all were or none of them were. They're all --

MR. KILARU: Your Honor --

THE COURT: -- similarly situated.

They're all coming in and they're all going to be on TV, and either they're all going to get paid or none of them is going to get paid.

MR. KILARU: Your Honor, with apologies, that's not what you said in *O'Bannon*, and that's not true.

In *O'Bannon*, the question was this. Yes, we have someone who we know is in the class. But what Your Honor said is: We don't know if that person would have been displaced from the class by someone staying longer in college as a result of increased compensation or them getting booted out of Division I entirely by another athlete who is excited about the opportunity they took.

In this case, you have *O'Bannon* dialed up to 11 because instead of what we were talking about in *O'Bannon*, which was the modest additional amount of compensation, you have hundreds of thousands of dollars being put on the table in this hypothetical but-for world.

Some student athletes, under the plaintiffs' model, could make 300-, 400,000 dollars over a four-year span, and that's going to implicate the exact same effects you found earlier. Are some students going to stay later? Yes. We have proof of this that we put in our brief, proof of student athletes who today are staying in school longer because of the other NIL opportunities that they have, before you even add

$400,000 of additional compensation in the mix.

We also have a new substitution effect problem here because the plaintiffs have limited their class to just the Autonomy 5 schools. So that's just 69 institutions. So there are tons of student athletes every year who go to schools in the Big East.

Just to give you a concrete example, the last two men's and women's -- the last men's national championship champion was the Yukon men's team, and the women's Yukon team is historically great. They're not in the A5. There are players every year who go to those schools --

THE COURT: Can we go with P5 here?

MR. KILARU: Sure. Happy to do P5.

THE COURT: I see P5 and A5.

MR. KILARU: There are players --

THE COURT: I keep wondering: Is there a difference? So if we could just agree --

MR. KILARU: I don't think there is.

THE COURT: -- on P5 for all purposes.

MR. KILARU: I'm happy to use P5.

THE COURT: Thank you.

MR. KILARU: Your Honor, there's people who go to schools in the Big East that are not part of the P5. These are elite basketball recruits. They are recruited on par with the people who are in the putative class.

Those people will make different decisions if in the P5, they can get what they currently get; or outside the P5, they can get what they currently get; and in the P5, they can get hundreds of thousands of dollars more. That is the literal same logic as in *O'Bannon*, but it's much more pronounced here because of their class and their claims.

THE COURT: What about counsel's analogy to the chickens; that while there may be scenarios in which it's a different chicken, it doesn't really matter because there's going to be -- some chicken is going to be there? Or that somebody else is going to -- if you don't buy the chicken for this price, somebody else is going to buy the chicken?

And that may be true and it may have some sort of impact on something, but it doesn't have an impact on who's in the class.

MR. KILARU: Your Honor, I think there's a fundamental difference.

THE COURT: I didn't say it as well as he did, but could you respond to Mr. Berman's --

MR. KILARU: Sure, Your Honor. There's a --

THE COURT: -- argument that if this were true, then every antitrust case could have the same -- could have the same sort of argument to be made: Oh, what if this? What if that? What if somebody else did something else?

MR. KILARU: I think if what the plaintiff said is

true, every antitrust case would be certified, because the plaintiffs would say: We've identified every person who's in the class; there was an injury; therefore, we get to move on.

I think the law requires them to posit what the but-for world is and who the people are who are actually injured.

And, again, this is very different from a commodity case. This is not a case where there's a bunch of purchases and people buy chickens or they don't. This is where students go to school and what decisions they make when they get there about how long to stay there and when they decide to leave. That's a fundamentally different set of decisions. It involves behavioral choices and economic choices.

And the plaintiffs have no model that actually accounts for those distinctions and those choices. And the model that they generated of the but-for world, I think, skews those choices and will actually cause -- would have caused different people to make different choices. So their model does not tell you who was actually injured. And if one were to certify the class that they've identified, there would be a significant number of people who are uninjured; and unlike in the chicken case, we wouldn't know who they are.

In the chicken case, you have a model --

THE COURT: We would or wouldn't?

MR. KILARU: We would not.

In the chicken case, you have a model, and it says here are the transactions that have zero overcharge and here are the transactions that actually have an overcharge.

In this, we would instead be trying to figure out who would have attended these schools.

And I think the last thing I will say on this is, think about it from the perspective of an individual case. If an individual student athlete brought this claim, we would be entitled to present evidence that that individual student athlete wouldn't have been in the Power 5 in the but-for world that they're positing because they would have been displaced by someone who played their position and stayed longer for the extra $100,000 or displaced by another elite recruit who took their spot because that elite recruit wanted the $100,000.

But to figure out who is actually in the class on a class-wide basis, you'd have to look at every individual student athlete; you'd have to figure out if they would have maintained their spot in the but-for world; who might have taken it. And that's why this is different from a chicken case where you just have a set of mathematical transactions and an algorithmic model.

THE COURT: Okay.

MR. BERMAN: Your Honor, can I go very briefly?

THE COURT: Okay.

MR. BERMAN: Three points, Your Honor, less than two

minutes.

There are three cases that have rejected the recon- -- the effort by counsel here to reconstruct a but-for world in the way he thinks we have to do it.

In Re National Football League Sunday Ticket Antitrust Litigation. It's not binding, but it's from the Central District of California, 2023 case, very recent. The Court ruled that you can't defeat class certification by saying, well, class members would face different effects in a but-for world based on each members' unique preferences.

In *High-Tech*, again, Judge Koh, in certifying a labor market class, the Court refused to consider whether higher wages in the but-for world would have caused the workers who held those jobs in the actual world to be replaced.

And finally, in the *Glumetza Antitrust Litigation*, which I think provides a very important case from Judge Alsup when he was dealing with the but-for world, he said something that is, I think, a critical framing issue. He said (as read):

> "The vagaries of the marketplace deny us sure knowledge of what plaintiffs' situation would have been. We don't know. Defendants restraint caused that."

We don't know exactly and precisely, but we're given, according to Judge Alsup, citing the Supreme Court, leeway in our models. And we believe that our model and our class

adequately accounts for the substitution effect.

THE COURT: I didn't catch the name of that last case.

MR. BERMAN: The last case was *Glumetza*, G-l-u-m-e-z-t-z-a. It's a Northern District of California case from Judge Alsup, two thousand- --

THE COURT: Okay.

MR. BERMAN: -- 21.

THE COURT: Okay. All right. Well, I guess my other -- well, I'd like to, before I just turn it over to you, turn to the *Daubert* questions.

I'm not inclined to exclude Dr. Rascher or Mr. Desser. But with respect to Professor Osborne, I do think that some of what she is being proffered for is telling me what the law is, and I think that's my job. And I have to get it briefed, and you all can brief it and tell me what Title IX means and what it doesn't mean and whether it applies or doesn't apply. But I think that's for you to brief and for me to decide, and not for an expert to talk about.

So I'm inclined to exclude that portion of it, but not to exclude the rest of what she has to say.

Does anyone want to address any of that, in particular, briefly?

MR. KESSLER: Well --

MR. KILARU: Sure, Your Honor.

MR. KESSLER: I'm sorry. Do you want plaintiff or

defendant to address first?

THE COURT: Well, I was offering both an opportunity. I guess you can go ahead.

MR. KESSLER: Thank you. Jeffrey Kessler, Your Honor.

Yeah, we obviously agree with your ruling on excluding the legal opinions.

There is one other opinion she offered which I also think should be excluded on another ground. She offered the opinion that the schools would not have adequate financial resources available to them in order to spend more money on women's sports to comply with Title IX and also be able to pay out the type of money that were in the but-for world.

The problem with her offering that opinion is, first, she didn't do any work for that opinion. She didn't look at any school finances, she admitted. She didn't do any analysis of the numbers. She has no experience in school finances. In other words, she's a legal expert; she's not a school administrator of finances or CFO. But not only did she not do the work, she has no expertise. Because she's not an economist, an accountant, a financial officer, no particular thing, she's not qualified to talk about the economic capability of the schools.

So for that one opinion, we think it also should be excluded based on her lacking the qualifications and having not done any real work to support it. It's just her kind of

feeling that schools wouldn't have that money available.

That's all for me, Your Honor.

THE COURT: Someone on the defense side want to respond on these points?

MR. KILARU: Sure, Your Honor. I'll start with the end and work backwards.

What Mr. Kessler said doesn't represent Ms. Osborne's -- Dr. Osborne's opinions in any way. She's not just basing this on a feeling. She's basing her opinions about what athletic departments can and can't do on her considerable experience working as a Title IX consultant.

I think the experience she's bringing to bear on this in real world is actually quite superior to the experience that their expert, Mr. Desser, is bringing on broadcast NIL, where he's just kind of making up a market and saying what the numbers are.

So we don't think there's a basis for excluding that conclusion.

THE COURT: Well, it's more a question of, I guess, looking at balance sheets and reading them and saying what they say. And I'm not sure we need a Title IX expert to look at balance sheets and say here's how much money this school gets and here's how much money that school spends and that sort of thing.

MR. KILARU: Your Honor, I think if this class is

going to get certified -- and, obviously, we don't think it should -- we're going to have to try this case to a jury.

And in front of a jury, I think if we're not allowed to point out the serious flaws with the models that the plaintiffs brought forth of the but-for world, specifically about Title IX and the funding and how the funding would actually work in the world they're positing where a huge amount of top-line revenue is devoted to a very small number of student athletes -- we have to be able to present that at a trial.

And we think Dr. Osborne's testimony is -- or Professor Osborne's testimony is admissible. It doesn't go to the ultimate issue. It doesn't usurp the jury's role. We don't think it usurps your role because, obviously, Your Honor could give instruction on Title IX, to the extent they're needed. But this is a huge flaw in their model, and we think that it's something we have to be able to present evidence on, and Dr. -- and Professor Osborne is our way of doing that.

THE COURT: Well, with respect to what Title IX says and means, yes.

With respect to how much money schools have and what they spend it on and how much more they could spend on it, that's a different question. You could say they could spend more money buying chickens than they are. But it's a question of finance, and that's -- we don't need a Title IX person for

that; we need an economist or a CFO or a CPA or something like that, I would think, at trial.

MR. KILARU: Your Honor, just I would say on that point, we don't agree that you have to have an economist for that. I mean, I don't think her testimony is that different from what Dr. Rascher is purporting to offer in rebuttal to her points. So I'm not sure the distinction between saying Dr. Rascher should get to testify in rebuttal to it and Dr. -- and Professor Osborne shouldn't get to do it.

The last thing I would note on this, Your Honor, is I think it goes to the issues with Desser and with Rascher. I'm not going to, here today, quarrel with you on the *Daubert* argument. We stand by our arguments, and we think that both of them should be excluded.

But I just want to note, under the case that Mr. Berman mentioned earlier, *Olean*, just the fact that those two experts may clear *Daubert*, in your view, doesn't mean that they've proffered a working economic model that answers the questions for class certification. Footnote 9 of *Olean* talks about how even if expert testimony gets past the *Daubert* stage, it can still fail to satisfy Rule 23 if it's based on unsupported assumptions or untenable real-world outcomes or prompts irrational results.

And I think this is the bigger and broader issue with at least their BNIL model. We think it also pervades the lost

opportunities model, which is that the experts have just made up a series of assumptions that ground their ability and are essential to their ability to generate class-wide answers.

They have assumptions that it's okay to have a world where men get 96 percent of revenues and women get 4 percent.

They have an assumption that conferences in a but-for world will make payments, even though there is literally zero evidence of conferences ever doing that.

They have assumptions that schools will allow the conferences to make the payments, even though in every real-world example we have, including the news of the last few weeks, it's clear that schools want to compete with each other vigorously for student athletes.

They have assumptions that 10 percent of broadcast contracts are attributable to NIL, which Desser admitted he has literally no support for.

So, obviously, we can talk about these more in the context of the class cert model -- motion. I would just note that I think that these are serious flaws under Rule 23, even if Your Honor doesn't view them as flaws under 702, which we think they are as well.

THE COURT: Okay. Well, you've sort of gotten into the merits, then, of the class cert motions.

And I guess all I want to do at this point is give you an opportunity to briefly address what you think needs to be

emphasized or that has come up today or that came up in the briefing and wasn't adequately discussed or whatever.

If I think of questions I have for you when I hear it, I'll ask them, but I don't have any particular questions other than the ones that I've -- that I've just raised.

So if you'd like to take ten minutes to just talk generally about the class cert motion; then I can hear from plaintiff; and then we can go on to the case management conference.

MR. KILARU: Sure, Your Honor. I'm happy to do that.

I think it's probably best to take these class by class or damages claim by damages claim, just for efficiency.

So I'd start with their broadcast NIL class. The key flaws here that we'd emphasize -- I'm going to try not to replicate the briefs too much -- are the failure of their model to come up with a reliable way to measure injury on a class-wide basis and the serious, intractable inter- and intra-class conflicts that their model creates, which we haven't talked about yet today.

I think the key thing that the plaintiffs need to satisfy Rule 23 is a working economic model that could actually exist in the real world. There's a case from the Ninth Circuit, *Dolphin Tours*, that says what you have to look at in these cases is what the world would have looked like if you got rid of the alleged anticompetitive conduct.

And what the plaintiffs have done here is say: We have a theory that all rules regarding NIL would be lifted.

But in order to satisfy Rule 23, they've actually come in with a complete set of assumptions that don't model what would happen if you actually lifted all those restraints. The but-for world in the damages case needs to take away the alleged restraints and model what would happen.

THE COURT: Why do you say they're saying that all NIL rules have to be lifted? They aren't lifting them with respect to the schools, for starters.

MR. KILARU: Right, but they're asking, Your Honor, for all --

THE COURT: There's a lot of rules. I'm not sure the plaintiffs are asking to lift all of them.

MR. KILARU: They're asking to lift all NCAA-level rules. But what they're positing, then, in their but-for world is a series of things that wouldn't happen in that world, and we know they wouldn't happen because the plaintiffs haven't proffered a single piece of evidence for them.

Number one, that somehow 10 percent of revenues are tied to broadcast NIL. That's completely made up by their expert, and he admitted it. There's no support for that anywhere in the record. That's a classic unsupported assumption under *Olean*.

There's a Title IX issue, that 96 percent of their

damages --

THE COURT: The problem with your argument about the made-up aspect is that the reason there's no evidence out there about what a NIL -- what NIL is worth is because the NCAA has prevented anyone from paying it. And this kind of argument is addressed in a number of different cases, and it's troublesome.

MR. KILARU: Your Honor, I don't think that's right because here, there are -- there are other regimes in the real world where there are broadcast of sports. Look at the professional sport example. And across all of those examples in professional sports where games are televised on -- put on television, there's not a single example of broadcast NIL being artificially disseminated out and --

THE COURT: Right, because --

MR. KILARU: -- provided a value --

THE COURT: -- the pros get salaries; they get paid.

So they don't break it down and say, "Here is your $10 million salary, and we're giving you X amount of that as being on TV and Y amount of it as going to the rotary club and speaking and Z amount of it as whatever." They don't break it down because they don't have to.

Here, the players aren't getting paid; so there hasn't been that sort of necessity to decide how much of the broadcast contracts that the schools are getting is attributable to the -- to the student athletes.

MR. KILARU: Your Honor, we don't agree with that. I mean, I think the fact that there's no real-world scenario where anyone thinks a broadcast NIL actually confirms an argument that we've made before at the motion to dismiss stage. There is no right of anything in these broadcasts, to begin with.

But setting that aside, there's no scenario --

THE COURT: There is no what?

MR. KILARU: There's no right --

THE COURT: There is no right?

MR. KILARU: -- of publicity, no compensable right --

THE COURT: Oh. No right of publicity. Oh, okay.

MR. KILARU: But I know you ruled on it. I'm not going back to that.

The point I'm making is more that if the plaintiffs were right, that some aspect of broadcast contracts were related to NIL, there would be some evidence somewhere in the world that that is true.

And there are sport leagues, like the PGA, for example, where NIL rights are assigned and there's no compensation to certain players at all.

So it's just not the case that there's some real-world analogy that they can point to or that the sole reason why there isn't evidence is because of the restraints that they're challenging.

Moving past the 10 percent to Title IX, unless you have questions on the 10 percent piece.

THE COURT: No. Go ahead.

MR. KILARU: The Title IX issue is, we think, a very significant one. They're the ones who have to model the but-for world that could exist in reality. That's what *Dolphin Tours* says. That's what they're required to do under Rule 23.

Their model assigns 96 percent of the revenues in this fixed pot to men and 4 percent to women, and they haven't done anything to account for that. Dr. Rascher admitted at his deposition that he hasn't considered Title IX at all. And at no point in their initial report, in their reply report, after we raised this issue through rebuttal experts, did they ever try to offer a solution for this problem. There isn't one.

THE COURT: Well, I guess what they say is that the schools aren't paying the money; the conferences are paying the money. And Title IX covers schools, not conferences.

MR. KILARU: I think there's two things they say. That's one of them, Your Honor.

On that one, Professor Osborne has given testimony about why that doesn't work. It's on page 30 of her report. It's that the schools are controlling every aspect of the payments that would actually be made because they're the voting member of the conferences. So I don't think that that sort of

end run around Title IX works. They also have offered no actual evidence or testimony or expertise of their own to rebut what Professor Osborne says.

Second, they say that Title IX doesn't apply to damages; but that has nothing to do with the key question, which is whether they have actually modeled a but-for world that could exist. The world that they have posited is not one that could ever exist because of Title IX, and so that's a key problem.

The next --

THE COURT: Well, maybe the schools would have to be more creative and come up with some kind of way that paid the female athletes some share of the revenue as well.

MR. KILARU: Well, they've actually allocated all of the share of the revenue, Your Honor. They said there's 10 percent that's attributable to BNIL, and their model gives 96 percent of it to the men and it leaves nothing else behind. So that that's the answer? They haven't give you an answer to that, and they can't cure that. And it's not enough for them to just get up and speculate and say: There might be a way to cure the problems with our model that we haven't modeled or explained in any way.

The conference payments is a separate and important issue. Their expert cannot identify a single example in the real world of conferences making systemic payments like what

they're proposing for broadcast NIL. It makes no sense because schools are the ones who --

THE COURT: Well, maybe they'll have to if that turns out -- if that is what an injunction tells them to do. Maybe they haven't done it before, but maybe they will.

MR. KILARU: Right. But, again, they have to model a world that would exist without artificial restraints placed on it by a court. They have to model a world that would exist in the real world.

And what they've modeled is a model --

THE COURT: Well, they model something that would be le- -- that would comply with what the Court ordered if the Court found an antitrust violation.

MR. KILARU: Your Honor, I'm not sure that -- respectfully, I don't think the Court could order conferences to make certain payments or not. Like, I --

THE COURT: No.

MR. KILARU: -- don't think that could --

THE COURT: But, no.

MR. KILARU: -- come out of an antitrust; so --

THE COURT: But the Court could order that they not commit antitrust violations or that they not do certain things that they've been doing.

MR. KILARU: Sure. And then the conferences would decide and their members would decide how to respond to that.

What the plaintiffs have posited that would come out of that world is one where conferences decide to make horizontally equal payments to every athlete in a specific sport.

And we often hear about natural experiments from the plaintiffs. Here, the natural experiments cut in our favor.

Your Honor issued an injunction in *Alston*. What happened in response to that is not conferences setting rules saying that every student athlete in certain sports get a certain amount of money. What came out in response to that is schools deciding, on an individual-school-by-individual-school basis, what payments that they would make, in competition with each other and based on their own institutional values.

That is what all of the evidence tells us would happen if the plaintiffs were actually to prevail in this case. But their expert hasn't modeled school competition. He's done nothing to actually assess that. And there's no evidence anywhere to suggest that one conference -- and I'm not going to use the specifics because of the confidentiality issues -- but that one conference will just sit by and accept paying $20,000 to certain student athletes when a rival conference against whom it's recruiting can pay $50,000 for student athletes. Again, everything we're seeing in the world of college athletics right now tells us that that's not something that schools are going to abide by.

So the world that they've posited has a series of artificial restraints built into it so that they can (a) try to show some kind of commonality and (b) stick with this revenue-sharing model that they're very focused on but that doesn't actually resemble what can ever happen in the real world.

We have another natural experiment which is that in non-revenue sports, some student athletes get scholarships and some don't. And schools decide on an individual-by-individual basis: Should we pay the student athlete or not? And there's every reason to think that that would be the case in the context of recruiting for elite student athletes for football and basketball.

And it's particularly reasonable to think that that would be the case in a case about NIL. NIL is inherently individualized. There's no way that you could say that two people have the same NIL value based on an artificial set of characteristics. And there's no earthly reason to think that a school is going to look at the star quarterback on the top team -- high school team and value them the exact same as a backup offensive lineman who's going to play on a different team. But, again, that's something that plaintiffs' model puts in.

And I think what *Olean* says, what *Mcglinchey* says, what other cases say is at some point, if there are just so

many implausible assumptions stacked up on top of each other, that can't clear Rule 23. Because, again, to use Mr. Berman's argument from earlier, if the plaintiffs were right, a class could be certified in every case because the plaintiffs could just say, "Here's a set of assumptions that create common impact. Let's go to a jury." That's not the law. They have to actually come up with a working economic model that resembles what the real world could look like.

If I could talk very briefly about conflicts and the lost opportunities class. I'll try to be brief.

I think the conflicts issues here are very significant because, as in the ***Shields*** case, which was decided recently by another judge in the Northern District, the plaintiffs are taking a fixed pot of money as to broadcast NIL and they're allocating it to student athletes, who in individual trials would have every incentive to come in and argue that that allocation is wrong.

The plaintiffs say, well, every football player is going to get a share of 75 percent. In an individual case, the quarterback of a football team in the SEC would come in and say, "I'm a superstar. I should get way more than that, and other athletes should get nothing." That is the type of pitting people against each other, conflicts over a fixed pot of money, that was exactly the issue in ***Shields***. There's no daylight between those two cases.

There's also inter-class conflicts. The plaintiffs said in their case management statement that it's irrelevant what the effects on non-revenue sports would be as to -- as opposed to what the effects would be on some of their models for football and basketball. I think that's a pretty extraordinary statement.

They're purporting to represent a class of all student athletes in Division I, revenue student athletes and not. It is a fact, an undisputed fact, that the revenues from the so-called revenue sports of football and basketball support these other sports that are offered on campus.

Plaintiffs' model just takes some of that revenue and gives it to a subset of student athletes, which is something that no athlete in the lost opportunity class would argue for in an individual case. There's no way an athlete who is one of their putative class members who has a third-party NIL deal would say: It's a great idea for the school to take some of the money that funds my scholarship and give it to someone else.

But these are all people they're purporting to --

THE COURT: When you refer to the lost opportunity, you're talking about the third-party NIL, what they call --

MR. KILARU: Yes, Your Honor.

THE COURT: -- the third-party NIL?

MR. KILARU: I believe it may have been called that at

one point.

THE COURT: Okay.

MR. KILARU: But, yes.

So we think these conflicts are significant, and they're not ones that can be remedied through any sort of -- they haven't tried to remedy them and they can't remedy them.

On the lost opportunities class, the plaintiffs are trying to take something that is inherently individualized, which is the value of an individual student athlete's NIL, which is something that their own expert admits varies across time and across year and across playing time and across opportunity, and they're trying to generalize whatever happened after July 21st, '21, to whatever happened before.

And there are, again, a series of completely untenable assumptions built into that model, and it doesn't work as a model because it systematically disadvantages certain members of their class to the exclusion of others.

THE COURT: Well --

MR. KILARU: I wasn't sure if you were going to ask a question.

THE COURT: Well, going back to the broadcast and the video games, the argument that's made is that while it may be that star athletes might -- if they were negotiating for a salary, might try to negotiate something more; but when we're talking about signing up people before an academic year to be

on TV and they can't be on TV unless all of them agree to be on TV, that that makes it into a sort of a different calculus.

And the same with the video games. If the popularity of video games is the realism of them, which I gather it is, the realism is, we've got all these guys or -- well, I guess it's all guys, huh? -- all these guys on the team, and either they all have to be in or their video game isn't going to be particularly popular and they aren't going to be wanted.

So perhaps the notion of negotiating for a higher salary might make sense in the context of negotiating for a higher salary but doesn't make sense in the context of what has to be, by definition, a group effort.

MR. KILARU: I think just a few things on that, Your Honor.

First, whatever the merits of that argument on an aggregate basis, it is certainly not what an individual student athlete would argue is appropriate in an individual case. If there were a case that involved just the star quarterback of the USC football team, there is no way he would come into court and say, "Broadcasters want my NIL and everyone else's NIL the same, so I'd happily accept an equal payment to everyone else just to make the broadcast work." But they're eliding that in their model.

Second, they don't believe that it is true that you need everyone in a broadcast to be compensated for NIL because

their own model excludes a ton of people who are shown in the broadcast. There are players on football teams who don't have scholarships. They are shown on television in the broadcast. One of the most common groups of people who doesn't have a scholarship is the kicker. The kicker is on TV all the time, often at the most dramatic moments of the game. And that person is not getting compensated under their model. So I don't think even they, in their model, actually believe that every participant in the game needs to have the NIL in order for it to work.

And then last, just on the video game piece, if what you're saying is true, I think we'd have a different reality than we have. We have been hearing about the sports video game coming up for over two years now. There is no structure in place today for licensing, and certainly, the evidence that we have in the record does not suggest that there's a view that you need everyone and to compensate everyone to make the game work.

THE COURT: There is some evidence to that effect. I can't cite you page and line of where it is, but it seems like I've seen that. But maybe counsel will be able to tell us.

Okay. Let me think. I had one other thing about the -- question about the third category.

Oh. What's wrong with the predictive quality, assuming that we don't have anything other than predicting

because we don't have any real-world examples of getting NIL payments? But the notion that if John Doe got X dollars this year when an NIL could be paid, why isn't it reasonable to say he probably would have gotten that same amount in the previous years, with perhaps some adjustment for the fact that if he had COVID or he broke his leg or something like that?

MR. KILARU: I think for three reasons, Your Honor.

I think, first, their expert admits that there are a whole host of other factors that assess whether or not you can get an NIL deal or not: your marketability, your interest in pursuing social media, the success of your team, whether you're involved in a personal controversy. None of those --

THE COURT: But all those things were in effect when you got your money that you got after July 21st, 2021.

MR. KILARU: Well, they were at that point in time, but we don't --

THE COURT: Right.

MR. KILARU: -- know what they would have been in the previous year or the year before that.

If you were a starter in 2021, you --

THE COURT: Well, that's my point. Is it not logical to assume that it would be?

MR. KILARU: It's not, Your Honor, because the nature of these transactions is that they vary, and your ability to monetize depends on specific moments in time. And the

plaintiffs simply assume that away in their model.

I think a second and related point to this is that the model systematically disadvantages some class members over others in a way that no individual would argue for in an individual case.

Their model takes, as the high water mark, 2021 and says if you have a deal in 2021, that is your compensation effectively for prior years. But if you're a player who had huge NIL value in 2019 and 2020 because you're a starter and much less NIL value in 2021, their model doesn't really account for that, and it systematically disadvantages you in a way you would never argue is appropriate in an individual case.

And just to highlight the variance here, I think it's useful to look at the two named plaintiffs who are actually bringing an NIL claim. One of them is Sedona Prince, whose NIL value was highest, she admitted, before July 1st of 2020.

THE COURT: Okay. I want to move along, and I don't want to get into details about individual cases. I can look that up.

MR. KILARU: Okay, Your Honor. I won't get into individuals. I'll just say that I think the named plaintiffs highlight how much variance there is and how hard it would be to administer this on a class-wide basis, because there's a whole separate issue of whether payments that are recorded in a database were actually ever made, which is another issue that

would implicate many trials and the concerns that were raised in the Ninth Circuit's *Bowerman* decision.

THE COURT: Okay. Would the plaintiffs like to respond in a not longer amount of time?

MR. KESSLER: I will do my best, Your Honor. I'm going to start off, and then Mr. Berman will conclude. But we'll be brief, I promise.

THE COURT: Yeah. And I can't hear you very well. I don't know if that's because you're in a big room or if I need to turn up my speaker.

MR. KESSLER: Is -- is this better?

THE COURT: I'm going to try turning up my speaker, and I hope that that won't cause various undesirable side effects.

MR. KESSLER: Is this better, Your Honor, now? Can you hear me?

THE COURT: I can hear you, but it's just not --

MR. KESSLER: All right. I'll -- I'll speak up more loudly. And if I'm speaking too loudly, please tell me.

THE COURT: It seems like I -- I think I've turned it up as loudly as I can here.

MR. KESSLER: Okay. So, first, I'll address the broadcast NIL damages methodology.

There are no made-up assumptions in that model. What we have is, first, Mr. Desser, who is one of the most

experienced experts in the negotiation of sports broadcast agreements, who uses his expertise and experience to determine that the value of NIL in broadcast would be at least 10 percent.

Now, where does he get that from? He didn't just pull this out of thin air. What he did is, based on his experience, he first determined that the value that athletes bring to the broadcast collectively is about 50 percent. And he based that on his years of negotiating contracts, which is unparalleled, and, number two, looking at the NFL and the NBA, because it's basketball and football, and seeing how in those sports they get about 50 percent as well in total.

But he said 50 percent includes the payment for playing the games, the compensation. That's prohibited in the NCAA, as Your Honor pointed out.

So the but-for world, he has to assume -- and this is very important. He can't assume a but-for world where compensation for playing games is allowed. All he could assume is a but-for world where everything stays the same except the NIL rules are removed, the ones we're challenging. So in that rule -- in that world, the NCAA rules prohibit any compensation for playing the games still, but we have struck down the rules that you can't pay them for their NIL.

And so he has to say: Well, what's the portion of the 50 percent that would be for the NIL?

Now, what could you look at as comparables? We heard counsel say, well, there's no real-world market for that. And as Your Honor pointed out, that's because the NCAA didn't permit any market for that. But there are real-world transactions.

THE COURT: I'm sorry to interrupt you, but did I turn my camera off while I was fooling with the volume on the --

MR. KESSLER: No. We can --

THE COURT: -- speaker?

MR. KESSLER: -- still see you.

We can still see you, Your Honor. You're fine.

THE COURT: You all can?

MR. KESSLER: Yes.

THE COURT: Okay.

MR. KESSLER: Okay.

THE COURT: Sorry.

MR. KESSLER: So there are real-world transactions he looked at. He looked at -- and Dr. Rascher did as well. They looked at transactions for video games, for apparel, for other areas where the only thing being sold is the NIL rights of the players because it's not the games. It's giving their names, images, and likenesses.

And what did he find? He found the range of each of those games, each of those products, everything he looked at, was in this ballpark of sort of 10 to 15 percent, and he came

out at the low part of that range.

So he looked at real-world transactions, which confirm his expertise. He didn't just assume 10 percent. He found it through expert analysis of the record. And so, Your Honor, we think that is a very reasonable way to model the world.

Then what Dr. Rascher did is he said competition among the conferences will cause the athletes to realize the full 10 percent. It can't be -- it can't be more than their NIL value.

They criticized Dr. Rascher, saying why wouldn't they give more money to the quarterback? Because NCAA rules -- which we're not challenging -- said you can't give money based on performance. You can't give money based on how you play on the field. We have to assume the but-for world as it would exist except for this one change.

So in that world where you only can get paid for your NIL, it's going to be based on up to the maximum of 10 percent, because that's the value that they found, and it's going to be paid out equally, because the testimony -- this is unrebutted. Every broadcaster required all the NIL rights. Their own expert, Mr. Thompson, admitted you need all the NIL rights because you don't know which athletes are going to start. Even if you have a starting quarterback, he might get hurt; the backup might play. You don't know who's going to come out.

And, therefore, since you need them all, it's like a

group license, Your Honor, which is how we postulate it would be. This is how video games are done. They get a group license for everyone in the real world, and they divide the money equally.

If you look at the NFL -- and Dr. Rascher did -- when you have a video game in the NFL, you can be the biggest star, Tom Brady, or you could be the lowest player; everyone is included in and everyone gets an equal share.

THE COURT: What about counsel's argument that the star quarterback would object and say that's -- "I deserve more and I don't like it"?

MR. KESSLER: NCAA --

THE COURT: And that that's a conflict within the class.

MR. KESSLER: Well, one, it's not a conflict within the class because as Dr. Tucker, their expert, said, if you have a reliable, reasonable model, the fact that some class members would get more under that model than others doesn't create a conflict. And Dr. Tucker admitted this because every damage model might pay a different class member differently. So if you change the model, you can never have a class.

In this model, by the way, everyone gets paid the same. And what the interests of the class is, right now they've got nothing. Right? They weren't allowed to get any dollars. So it's in all the interests of the class to have a

reasonable, reliable model. So that's not a conflict.

In terms of the quarterback insisting on more, the NCAA rules in the but-for world don't let you pay more to recruit the quarterback. That is what's still prohibited. It only could be the NIL rights. And we've seen again in the real world, basketball players all get paid the same for video games. When they do collectibles, they all get paid the same because they all need it. When they do deals where everyone is required, the way that gets paid out is an equal value. So that's the real world.

And remember, Your Honor, the issue of allocating damages, which is what we're talking about now, is not even the issue of class certification. That's an issue for down the road.

The issue of class certification is class-wide impact. And the measure of 10 percent for the whole class, there's no conflict in that. Even if after the trial, there were issues of how do you allocate it, courts deal with that down the road; and if there are any conflicts, you could get separate counsel to advocate, well, I want more or less out of it. But the jury is only going to find what's the class-wide number, and that clearly is within this broadcast NIL.

The last thing I want to say about broadcast NIL, Your Honor, is just the following: All of the assumptions here -- and this goes into Title IX -- is based on the real

world as we found it. The reason why 10 percent goes more money to men than women is because, regrettably, the broadcast contracts are much larger for men's basketball than female basketball, for example.

Now, whose fault is that? There may be, frankly, real deficiencies in the NCAA as to how they have promoted women's basketball and why that gap is so big, but that is the but-for world as our expert could take it. If the expert was --

THE COURT: Well, maybe the schools and the conferences are obliged to fix that and to make up for it.

MR. KESSLER: And that's correct, Your Honor. And if there is a Title IX issue -- and I think ***Alston*** is a great example. You will remember, in ***Alston*** we only had an order from Your Honor with respect to men's and women's basketball and football. Those are the only things we had. And because there are so many more football players, that would mean there would be many more ***Alston*** payments to the men than the women.

What did the conferences do? They went out and voluntarily decided to extend ***Alston*** payments in most conferences, not all conferences, but in most of the Power 5 conferences to all of their sports. So women's volleyball players and tennis players and gymnasts, they all are eligible for ***Alston*** payments now too. The schools found a way to do equity, as they should.

But that doesn't mean for damages, that we could

somehow assume in the but-for world that that happened. They would then come in and say: Well, you're speculating all this money would be paid. And he said: Well, how would that be paid if 10 percent doesn't cover it?

There's no limit in the but-for -- in going forward. We're not -- going forward, not backwards. Going forward, they could pay the women as much as they want. There's nothing to stop them. We're not going to ever ask you to issue an order saying you can't pay the money, just like in ***Alston***. So they were able to pay that money. So this is a non-issue.

The other thing about Title IX is that there's no question -- we're only looking at damages now, not the future. There is not a single case that says Title IX applies to damages payments. Doesn't make any sense.

Let's say you had a discrimination case and the case was discrimination against women, and you had a damage class where women got all this money. Could you come in and argue that, well, because you're paying damages now to the women in a discrimination class, that that somehow violates Title VII, just because you're giving all this money now to women instead of to men? Of course not. When damages are remedying for a wrong, they're not subject to Title IX, to begin with. So Title IX is a non-issue.

And it doesn't apply to conferences. And one of the arguments they make is, well, conferences have never paid this

money before. Well, of course they haven't because the rules prohibited them from paying it.

And remember, we're talking about plausibility. The reason, Your Honor, we were referencing an article today in the *New York Times* by Jordan Acker, who is the chairman of the Board of Regents of Michigan, is in this very article today, just coincident, Mr. Acker says: What the NCAA must do is have the conferences pay a percentage of their television revenues to the athletes because that's the only thing that makes sense going forward. That's from the former chair of the Board of Regents of the University of Michigan, one of the Power schools, and he talks about the growing support for that. So how could that be implausible?

And remember, at class certification, you're not deciding who's ultimately right. You're just deciding is the modeling of the world realistic enough that it can go on to the jury for the jury to decide.

When you have NCAA, you know, witnesses, you have their own heads of the universities saying conferences can pay this money, how could this be an implausible model that they say we're just making up out of thin air in terms of that?

So, Your Honor, that's all I wanted to say about broadcast NIL, unless you have anything else that you need to hear about --

THE COURT: No. But I do need you to finish up. So

if you want to talk about the other two, you should do that --

MR. KESSLER: Yeah. I'm just going to say --

THE COURT: -- promptly.

MR. KESSLER: -- something about the third party, what we call the lost opportunity class, the third party, and Mr. Berman will finish.

Quickly, on the lost opportunity, the lost opportunity is a classic but -- before-and-after methodology. That methodology has been accepted time and time again in the courts. Their own expert, Dr. Tucker, said it is a very, very well-accepted methodology in antitrust cases.

And what they're quibbling over is have proper adjustments been made between the before and after period. Dr. Rascher has adjusted for COVID. He has adjusted for whether you're a starter or a substitute. He has adjusted for whether you change conferences in the value. The value --

THE COURT: How did he do that? Does he come up with an amount for each thing, like everybody who changed conferences gets 100 more dollars and everybody who had COVID gets 100 less dollars? Things like that?

MR. KESSLER: Well, not if you got COVID, Your Honor.

What he did is -- I'll give you an example -- is that -- and he tested this on the Big Ten and the SEC for basketball and football players so far. At trial, he's going to do this for everyone in the class.

And he explained the methodology for now. And the way he did it is, so, for example, he looks at, let's say, two conferences: the SEC, let's say, and the Big Ten. And he actually statistically measures is there a difference in NIL payment values by virtue of what conference you were in. And if he finds a statistically significant difference, he takes that adjustment. And if you shifted conferences from the before period to the after period, he will adjust up and down to that.

He tests, statistically, if being in the top quartile of playing time in basketball versus the second quartile or the third -- you know, he does each of the quartile -- does that affect your NIL value statistically? And if there's a difference and you shifted your playing time, then he does an adjustment for that.

For COVID, he did an adjustment class-wide for the fact that revenues were depressed during COVID and may, therefore, depress the amount of NIL payment. So he did a class-wide adjustment there.

And normally, Your Honor -- and I've done a lot of these cases. I know you've seen them. Normally, the other expert comes in and says: Oh, you should make these three other adjustments, and here's what they would show. Why didn't you make them?

Here, the expert's done nothing. They don't suggest

any other adjustments. They just come in and say: We don't think your adjustments are sufficient.

That might be something they can argue to the jury, Your Honor, but the case law makes it clear, that is not a basis for defeating class certification when all we're trying to show here is that this is a reasonable class-wide method with the classic before-and-after methodology for doing this.

So I know I've used up I hope not all the time because I'm going to have Mr. Berman please finish briefly on the other portions, if I can.

THE COURT: Okay.

MR. BERMAN: I try to tell my young attorneys that less is more; so I'll be way less.

First, Your Honor, the discussion that Mr. Kessler just told you about Dr. Rascher --

THE COURT: Oh, there you go. Now you turned it up. Did you do something?

MR. BERMAN: I didn't do anything.

THE COURT: Oh, it suddenly got louder.

MR. BERMAN: So --

THE COURT: Okay. Go ahead.

MR. BERMAN: -- the discussion that Mr. Kessler was referring to, where Dr. Rascher makes all these adjustments for the lost opportunity class, is at page 69 through 80 of his reply.

Allocation, there was a conflict because of this star quarterback issue. There's no conflict because, as Mr. Kessler explained, in our model, based on what we think is the real world, there wouldn't be a negotiation for broadcast revenue between the star quarterback and CBS or ESPN. It would be done on a groupwide basis.

The same is true --

THE COURT: No. The negotiation would be between the star quarterback in his living room with the recruiter from Minnesota or whatever.

MR. BERMAN: But not on broadcast revenue because no one is going to start negotiating with student athletes one by one for broadcast revenue. It's done --

THE COURT: Well, maybe the athletes would. Maybe they -- I mean, that seems to be what they're positing, that the star --

MR. BERMAN: But they --

THE COURT: -- quarterback would say: I'm not going to come for a mere 10 percent of the broadcast revenues. I want -- I'm the star. For me to come to your school, I need more.

MR. BERMAN: Well, we put in the reliable revenue model from Dr. -- from Mr. Desser that says that's not the way it would work. You've admitted it. We're not *Daubert*ing it. It's for the jury to decide who's right or who's wrong. It's a

class-wide issue. Either we're all right or we're not right.

And the NCAA is not allowed, under its rules, to do the kind of recruiting that you just mentioned. They can't go into a room and say that.

The conflict doesn't also exist on video games because -- this is, again, Rascher at 129 and 137 -- EA Sports has said: We want to pay the kids equally. We're not going to negotiate with each kid. It's not possible.

So we put in a plausible model that this would be done on a group basis, and therefore, there's no conflict.

The conflict between -- sports conflict between the revenue-producing sports and the non-revenue-producing sports is based on speculation. What they're saying is: We couldn't afford your model, and so we would cut sports, and so you have a conflict.

There's no economic analysis whatsoever from any school or any conference that they put before you that shows that. It's the same kind of nonsense that they used at the *Alston* trial, where they had people come in and say demand would go down and they had no economic study.

The only economics that suggest there's no conflict and this wouldn't happen is Dr. Rascher, and that's at reply, paragraph 36. What Dr. Rascher found was that broadcast revenue would be 24 percent of total revenues. So you take 10 percent of 24. You're talking about 2.4 percent of revenues

that would now be added costs that they would have to distribute.

But their actual revenues in the last few years had increased by more than 2.4. So they're making money. They're not going to go out of business. They're still making money, even if they paid the 2.4 percent of broadcast revenues. So --

THE COURT: I sort of lost you there. Are you talking about the schools, the conferences, or the NCAA?

MR. BERMAN: The conferences.

THE COURT: The conferences.

MR. BERMAN: Right. So if they had to pay the 2.4 percent -- right? -- to the student athletes, that's still less than the increased revenue they're making every year.

THE COURT: Oh, okay.

MR. BERMAN: So there's nothing to suggest that any sport would be imperiled, and therefore, there's no conflict.

And the last point I'd like to make is on the lost opportunity class, where counsel said, look --

THE COURT: By lost -- I wish we had just called it the same thing all the time. You're talking about the third-party NIL?

MR. BERMAN: Third-party NIL. Okay. Third-party NIL. I apologize.

For the third-party NIL class, counsel said there's a conflict because people wouldn't be happy if they got a certain

amount of dollars this year from NIL and they didn't play much and they may have gotten more money in earlier years because they played a lot. Well, we agree. That's why Dr. Rascher modeled that. His model takes care of that, takes care of the amount of playing time, as Mr. Kessler pointed out --

THE COURT: With the adjustments, you mean?

MR. BERMAN: Exactly. So there's no conflict in the third-party NIL class.

And, again, the third-party NIL class, we go back to --

THE COURT: It's more of a third-party NIL damage category.

MR. BERMAN: Yes. Yes.

What we've done is, as Jeff pointed out, we know what they made once the restriction was lifted. We're backcasting, we're doing it before and after.

And what counsel is suggesting, there's a host of things that could have happened. But, again, I go back to the framing issue that Judge Alsup noted. We can't know with precision what exactly would have happened because we don't know how the world would have operated because of their restraints. And so we've made a reasonably reliable backcast of what would have happened. That's all that we're required to do in these circumstances.

And that's all I have, unless you have more questions,

Your Honor.

THE COURT: No, that's fine.

Did you want to reply briefly, Mr. Kilaru?

MR. KILARU: Very briefly, Your Honor, and I promise I'll only say things that haven't been said before.

THE COURT: Oh, good.

MR. KILARU: First, Your Honor, Mr. Kessler mentioned how they looked at group licenses that happen in other sports.

I think it's really important to remember the claim that they've pleaded, which is a labor market claim. They pleaded that at the motion to dismiss stage to get around previous decisions.

They're modeling -- they're supposed to be modeling the labor market, and their expert admitted that these group licenses where people's NILs are used on trading cards are not payments that are made in a group -- made in a labor market. They're not. Those are not labor market payments. He said they're something different.

THE COURT: I don't know what you mean by that. What do you mean, they're not --

MR. KILARU: So Mr. Kessler --

THE COURT: -- a labor market?

MR. KILARU: -- said we have -- Mr. Kessler said we have all these examples of trading cards, of playing cards, things like that.

Their expert --

THE COURT: Well --

MR. KILARU: -- said -- admitted -- Dr. Rascher admitted those are not payments made in a labor market where --

THE COURT: Okay. Those are pretty de minimis, I think. I'm more interested in the video games, which were quite remunerative, it seems, and popular.

MR. KILARU: I think the more important --

THE COURT: And as I understand it, they were done by way of group licenses --

MR. KILARU: They were --

THE COURT: -- back in the day.

MR. KILARU: Yes, Your Honor. But I think this also goes to the question of what they're trying to model with their broadcast NIL claim, which is supposed to be modeling a labor market, not some separate market for licenses. That's --

THE COURT: Well, now you're switching to the broadcast. There's --

MR. KILARU: It's both of them.

THE COURT: You've got your broadcast, your video games, and your other.

MR. KILARU: For both of them --

THE COURT: Which is it you're saying isn't addressing the labor market?

MR. KILARU: So both the broadcast and the video game

claims are supposed to be modeled on a labor market. That's what you ruled at the motion to dismiss.

THE COURT: Okay.

MR. KILARU: And the point I'm making is that the model that they've come up with doesn't mention any -- doesn't resemble any functioning labor market.

There's a declaration in the record from Jimmy Sexton. And I won't talk about what it says. But he's a professional sports agent who says this is not how this labor marked ever developed. The precise type of negotiating -- negotiating you talked about, where the star quarterback says "I need more money to attend your particular school," that's what happens in labor markets. Players negotiate for the biggest salary they can. They don't just accept some equal payment that's given to everyone on the theory that half a loaf is better than none. That's not what happens in a labor market.

THE COURT: Well, the school could come and say, "You should come to my school because we have -- we're really popular --

(Stenographer interrupts for clarification of the record.)

THE COURT: The reporter is having trouble hearing?

Oh, sorry. I probably put my hand in front of my mouth. Sorry.

(Record read as follows:

"THE COURT: Well, the school could come and

say, 'You should come to my school because we have -- we're really popular' --")

THE COURT: -- and we have a lot of video game contracts, and you'll get your fair share or your equal share of those.

MR. KILARU: That may be something the school says, but the question is: Would the school also say, "And we would like to be able to give you more money" and the player would say "I want more money because I'm a superstar. I'm the quarterback"?

THE COURT: Well, okay.

MR. KILARU: The star quarterback at USC --

THE COURT: But the fact that they're -- are you saying that it wouldn't be a labor market issue if they were -- if they were using as an incentive that they had a lot of video games that the person would share into? Why would that not be a labor market --

MR. KILARU: What I'm saying is that the model that they have is not a labor market model. It's a group license model where everyone gets the same thing by virtue of being in a group license. It's not what would happen in an actual labor market.

And their own expert admits that because in his own literature, in his own work, he says people in sports labor markets are compensated based on their units of talent, not on

some idea that everyone is going to get the exact same amount.

THE COURT: Okay.

MR. KILARU: Second, Your Honor, it's not a defense to Title IX to say what Mr. Kessler said, that more revenues are generated by some sports than others. That's just not how Title IX works. That's not a defense to Title IX.

Third, the point is not that damages are subject to Title IX. It's that the world that they're modeling could not exist because of Title IX. And it's not just the aggregate --

THE COURT: Because there's not enough money?

MR. KILARU: It's because of what they've done. They've allocated all the money to men and allocated very little to women. That's the Title IX problem. That's their model. That's the world they want you to sign off on. That's not a world that could exist.

THE COURT: Well, maybe they're going to have to spend more of their money and pay more people or --

MR. KILARU: But they can't do that, Your Honor.

THE COURT: -- divide it more ways.

MR. KILARU: Well, that's -- first of all, the dividing more ways, they came up with the model, and they can't alter it now. Their model doesn't divide it more ways.

But, second, they also said -- you look at how they built their model, the only thing that's permissible to be paid for is the NIL that comes out of broadcast. What they say is

the NIL that comes out of broadcast is the 10 percent. They've allocated the whole 10 percent. So to the extent they're talking about equalizing payments for NIL, their model has no mechanism for them to do that.

The last point I would make, Your Honor, is just on the third-party class -- or the third-party NIL class. What Mr. Kessler said isn't entirely accurate. We didn't come in with our own adjustments to their model because the point is that none of this can be done in the aggregate. Even the adjustments Dr. Rascher has come up with basically say: Well, if you were in the SEC, you might have had a higher NIL value than to -- than if you were in the Pac-12.

That is not how NIL works. No individual student athlete is tied to the conference that they played in. It's tied to a number of intensely personal qualifications and qualities that vary over time. And the very act of creating a model like they have, that assumes everything can be done in the aggregate, everything that can be done in bunches, and everything that happened after one period in time would be replicated before, is precisely the problem.

THE COURT: Okay.

MR. KESSLER: Sorry. Just one minute.

THE COURT: Okay.

MR. KESSLER: Okay. Dr. Rascher's model is a labor market model. He explains that in his report.

What this is about is how the athletes will be compensated instead of having a rule that prohibits them from being compensated for the NIL. That's all in the labor market.

The reason we looked at things like video games and products is to just value the NIL value, to cover what would be the NIL value that the NCAA would allow.

And this goes to my last point. Mr. Sexton, who he points to, said: Oh, the quarterback will hold out for more money to go to the school. NCAA rules prohibit that in the but-for world and in this world. Mr. Sexton is talking about a labor market that is completely unrestrained. We don't have that option. We have to model a world where the NIL restrictions are gone, but the no-pay-for-play rules are still in effect. If the NCAA wants to now give up all their pay-for-play rules going forward, we would be delighted, and you won't have these issues going forward.

But in the past, we have to deal with the reality, and the reality was they had those pay-for-play rules, and that's why Mr. Sexton's world can't exist in the but-for world.

Finally, NIL, he says: Well, you have personal qualities, like social media presence, that are important to NIL. We agree. But you're going to have those same qualities in the before period and the after period. There's no reason to think you're a different person in the before and after period. And every before and after period makes assumptions

that you hold everything else you can constant, adjust for changes in the demand. That's exactly what we've done here, Your Honor.

That's all I have, unless you have something else for me.

THE COURT: All right. I'd like to turn to case management issues for just a minute. I don't think there's too much.

We've got a stipulated schedule which has us headed for trial a year from January, which is an awfully long time from now. If you wanted to do it sooner, I could do it sooner. I don't quite know how we got a trial date so late, but I guess that was something you all agreed to. But -- and given if that's the trial date, then all of the other dates fall before it.

But my question is what you propose to do to try to settle the case. I think you said you had chosen a mediator, if I'm not mistaken.

MR. KILARU: We have, Your Honor.

THE COURT: And I don't know if you've met with that mediator already or have plans to meet with the mediator or what you are thinking about the best way and time to try to settle if not all of the case, than perhaps a partial settlement as has -- as was done in some of the other cases.

MR. KILARU: Your Honor, I'm happy to start.

Mr. Berman can obviously fill in.

Obviously, I don't think we want to get into the details of any discussions --

THE COURT: No. And I don't want to put you on the spot either.

MR. KILARU: No, that's fair.

We've had some discussions. We intend to continue working on those discussions, is what I would say at this point.

THE COURT: Okay. And what do you think, Mr. Berman?

MR. BERMAN: We are aware of our responsibilities under the local rules to try to --

THE COURT: Could you do whatever you did before to make yourself louder?

MR. BERMAN: We're aware that we're supposed to be, you know, trying to settle under the local rules. We think we are fulfilling what we're supposed to do. And I don't really want to say more than that.

THE COURT: I could issue an order. Maybe neither of you wants to step out on this. But I could issue an order.

MR. BERMAN: We don't think there's --

THE COURT: For the certain numbers of conferences with certain participations and certain time frames that they would happen, like after the class cert order comes out, before the summary judgment motion is made.

Maybe you don't want to admit that you think that's a good idea, but I could do that.

MR. BERMAN: We don't think it's necessary, Your Honor. We're not trying to go in detail because --

THE COURT: No, I -- right. I know why you don't want to talk about it but --

MR. BERMAN: It's happening.

THE COURT: Okay. You could just say something like "A more hands-on approach might be helpful" or "Some deadlines might be helpful" or something like that.

But I don't hear anybody saying that.

MR. KILARU: I think we will come -- I think we'll come to you if we need that, Your Honor. I don't know if Mr. Berman disagrees with that right now. We don't think that that's necessary.

THE COURT: Okay. Well, either of you should feel free to raise it. You can raise it privately, just amongst yourselves, if you prefer. But I don't want everyone standing on ceremony and saying: I can't be the one to propose this.

MR. BERMAN: There's no ceremony going on here, Your Honor.

(Laughter.)

THE COURT: Okay.

MR. BERMAN: The other thing I would note is when I was getting ready for the CMC, I had the same reaction you did.

Wow, why is our trial date a year from now? So --

THE COURT: Well, you stipulated to it.

MR. BERMAN: Yeah, we did, and I think that was --

THE COURT: If there had been an earlier stipulation, which was, likewise, somewhat -- I don't want to say "relaxed" -- which was, likewise, rather lengthy, and then you stipulated to extending it, and I signed off on the stipulation. Now I'm sort of wondering why.

But there it is.

MR. BERMAN: Your Honor --

THE COURT: If you want to talk about that too, I'd be amenable to trying to tighten that up.

MR. BERMAN: Yeah. We will -- I'm going to raise it because I had a reaction: Why did we do this? I can't remember why we did. And so --

THE COURT: I think that was my question too. Not why did you do it, but why did I do it.

MR. BERMAN: Okay.

THE COURT: Okay. Anything else, then, from anybody?

MR. BERMAN: Not from our side, Your Honor.

THE COURT: And what do we have next? I guess you're finishing up -- oh, we've got some briefing coming in next week. I hope that won't resolve into a contested thing. But if it does, I'll do it on the papers, I'm sure, or send it to Judge Cousins.

And then, after that, you're doing your discovery; and then you're getting into your expert disclosures and expert discovery; and then your summary judgment is aimed at about a year from now and your trial, about a year and a half from now.

Okay. Thank you.

MR. BERMAN: Thank you, Your Honor.

MR. KILARU: Thanks, Your Honor.

MR. KESSLER: Thank you, Your Honor.

THE CLERK: Court is in recess.

(Proceedings adjourned at 4:16 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Tuesday, September 26, 2023

Ana Dub

Ana Dub, RMR, RDR, CRR, CCRR, CRG, CCG
CSR No. 7445, Official United States Reporter